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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO ANGEL AYON,

Defendant and Appellant.

C084355

(Super. Ct. No.
LODCRFECOD20160006023)

Defendant Gustavo Angel Ayon and codefendant Cergio Hernandez, both known by law enforcement for having gang contacts, ran from police in Sureño gang territory. While fleeing, defendant discarded a loaded firearm. The jury found him guilty of being a felon in possession of a firearm, possession of ammunition by a prohibited person, carrying a loaded firearm in public while an active participant in a criminal street gang, and criminal street gang activity. Gang enhancements as well as allegations of a prior strike and prior serious felony conviction were also found true. The court sentenced defendant to an aggregate term of 12 years in state prison.

On appeal, defendant contends insufficient evidence supports: (1) his carrying a loaded firearm in public while actively participating in a criminal street gang conviction, (2) his criminal street gang activity conviction, and (3) the gang enhancement. In supplemental briefing, defendant also contends that the matter must be remanded to allow the trial court to exercise newly-granted discretion under Senate Bill No. 1393 (S.B. 1393) to strike his prior serious felony conviction enhancement under Penal Code section 667, subdivision (a).¹

I. BACKGROUND

On April 29, 2016, Lodi Police Detectives Elias Ambriz and Mitchell LeStrange were performing proactive gang enforcement and patrolling Sureños gang territory in the east side of Lodi in an unmarked truck. Neither officer was in uniform, but both wore tactical vests with “Police” on the front and back in white lettering, and their badges.

Around 4:30 p.m., the officers saw two men in an alley walking toward the officers. The officers recognized one as Cergio Hernandez. The other man was later identified as defendant. Detective Ambriz got out of the car to contact Hernandez and Detective LeStrange drove to the end of the alley in case someone ran. Defendant and Hernandez walked together and changed direction. Detective Ambriz walked through an apartment complex toward them.

In the complex parking lot, Detective Ambriz recognized Hernandez from prior gang enforcement contacts and a previous arrest. Hernandez had recently been with another Sureño gang member who ran and threw a gun. Detective Ambriz also recognized defendant. In 2011, the detective had interviewed defendant twice at a park, a Sureño hangout in east Lodi. Defendant was with Hernandez one time and with another Sureño the other time. The detective also recognized defendant’s name from two police

¹ Further undesignated statutory references are to the Penal Code.

reports. Defendant had been with other Sureños in a 2011 stabbing and a 2011 weapons arrest. The detective had also arrested and investigated defendant for a 2014 robbery. The detective had at least 10 prior contacts with defendant.

As Detective Ambriz approached defendant, he observed that defendant was wearing baggy clothing and had his right hand on his pants waistband as if he were holding something. When the detective greeted the men, they ran and the detective gave chase. Defendant led and his right hand never left his waistband while his left hand moved normally. Hernandez's hands both moved normally, and Detective Ambriz never saw him put his hand in his waistband. During the chase, the detective saw defendant remove his hand from his waistband and throw a handgun over the fence. The detective heard the gun hit concrete ground. Defendant and Hernandez then split up. Detective Ambriz continued chasing defendant, which ended at an intersection where Detective LeStrange ordered defendant to the ground at gunpoint. Detective Ambriz retrieved the loaded gun.

Defendant was charged with being a felon in possession of a firearm (§ 29800, subd. (a)(1)—count 1), possession of ammunition by a prohibited person (§ 30305, subd. (a)(1)—count 2), carrying a loaded firearm in public while an active participant in a criminal street gang (§ 25850, subds. (a) & (c)(3)—count 3), and criminal street gang activity (§ 186.22, subd. (a)—count 4).² For counts 1 through 3, it was alleged that defendant committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist criminal

² Hernandez was originally charged jointly with defendant. He was charged with being a felon in possession of a firearm, possession of ammunition by a prohibited person, criminal street gang activity, and misdemeanor resisting, obstructing or delaying a peace officer. In September 2016, Hernandez pleaded guilty to being an active gang member (§ 186.22, subd. (a)), a felony, and to the misdemeanor resisting offense.

conduct by members of the gang. (§ 186.22, subd. (b)(1).) It was further alleged that defendant had a prior strike (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)).

At trial, Detectives Ambriz and LeStrange testified to the above facts. Defendant testified on his own behalf. He admitted being an active gang member in the Barrio Mojados Sureños. Shortly before the incident, he and his cousin, Hernandez, were returning from a restaurant; they were not acting on behalf of the gang at the time. Defendant denied having a gun and claimed he did not know if Hernandez had a gun; Hernandez never told him he had a gun. Defendant generally tried to avoid law enforcement, and when Hernandez pointed out the unmarked police truck, they tried to hide. As soon as Detective Ambriz approached them and spoke, defendant fled. Defendant denied throwing a gun over a fence during the ensuing pursuit. Because Hernandez and Detective Ambriz were behind him, he could not see them. He was eventually detained by the detectives at gunpoint.

Defendant was convicted as charged, and the jury found the gang enhancement allegations true. In a subsequent proceeding, the trial court found the prior strike and prior serious felony conviction allegations true.

The court sentenced defendant to an aggregate term of 12 years in state prison; four years for count 1 (the midterm of two years, doubled for the strike prior), a consecutive midterm of three years for the criminal street gang enhancement, and a consecutive five-year term for the prior serious felony conviction. The court imposed and stayed sentence on the remaining counts. (§ 654.) Defendant timely appealed.

II. DISCUSSION

A. Sufficiency of the Evidence

Defendant contends insufficient evidence supports his convictions for carrying a loaded firearm in public while an active participant in a criminal street gang (§ 25850,

subds. (a) & (c)(3)—count 3) and criminal street gang activity (§ 186.22, subd. (a)—count 4). We agree.

“ ‘In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]’ [Citations.] All conflicts in the evidence and questions of credibility are resolved in favor of the verdict, drawing every reasonable inference the jury could draw from the evidence. [Citation.] Reversal on this ground is unwarranted unless ‘ ‘upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ ” ’ [Citation.] This standard applies whether direct or circumstantial evidence is involved.” (*People v. Cardenas* (2015) 239 Cal.App.4th 220, 226-227.) “ ‘Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.’ ” (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

1. Count 4 – The Substantive Gang Offense

Section 186.22, subdivision (a) provides, in relevant part, as follows: “Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished”

For a violation of section 186.22, subdivision (a), the prosecutor must prove:
(1) active, not merely nominal or passive, participation in a criminal street gang;

(2) knowledge of the gang's members current or past engagement in a pattern of criminal street gang activity; and (3) willful promotion, furtherance, or assistance in felonious criminal conduct by the gang members. (*People v. Lamas* (2007) 42 Cal.4th 516, 523.) The third element of section 186.22, subdivision (a) requires that at least two members of the gang commit felonious criminal conduct; a defendant acting alone does not suffice. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1128-1130, 1138-1139.)

Defendant essentially concedes that elements one and two were met, noting that the evidence showed that he was a gang member and possessed a handgun on his person. He challenges the sufficiency of the evidence to support the third element, however, arguing that the facts here are similar to those in *People v. Johnson* (2014) 229 Cal.App.4th 910 (*Johnson*). There, the defendant was a gang member and was found in possession of a loaded gun as he accompanied two unarmed gang members to a nightclub. There was no evidence that the unarmed gang members helped the defendant obtain the gun or that they possessed the gun jointly with the defendant. *Johnson* held that the evidence did not show that the defendant possessed the gun “in tandem” with another gang member. (*Id.* at pp. 921-923.)

Like in *Johnson*, defendant argues the record is devoid of any evidence showing that he and Hernandez possessed the firearm together, that he aided and abetted Hernandez in possessing the firearm, or that Hernandez aided and abetted him in possessing the firearm. In fact, according to defendant, no evidence showed Hernandez even knew about the firearm.

While the People argue the record shows Hernandez pleaded guilty to the substantive offense of actively participating in a criminal street gang (§ 186.22, subd. (a)),³ thus supplying the necessary felonious conduct by more than one gang member to

³ See footnote 2, *ante*.

satisfy the third element of defendant's section 186.22, subdivision (a) offense, defendant counters Hernandez's guilty plea cannot be used as evidence bearing on his guilt for purposes of count 3 and count 4. Defendant has the better argument.

It is well settled that “ ‘a codefendant's plea of guilty is not to be considered as evidence bearing upon the guilt of the defendant then on trial and that the latter's guilt must be determined solely on the basis of the evidence *against him* and without reference to the codefendant's plea.’ ” (*Hudson v. North Carolina* (1960) 363 U.S. 697, 703.) Indeed, the California Supreme Court has recognized that a guilty plea of a codefendant, while admissible against the codefendant as a declaration against his own penal interest, or as a confession or admission, says nothing about another defendant. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1321-1322; see also *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 5 [“a verdict regarding one defendant has no effect on the trial of a different defendant”].) Thus, Hernandez's guilty plea, without any *evidence* showing he jointly possessed the gun with defendant or knew about it and aided and abetted defendant in possessing the gun, was insufficient to establish defendant's guilt of the substantive gang crime charged in count 4.

2. *Count 3 – Carrying a Loaded Firearm While Actively Participating in a Criminal Street Gang*

In count 3, defendant was convicted of carrying a loaded firearm in public while an active participant in a criminal street gang, a felony. (§ 25850, subds. (a) & (c)(3).) Defendant contends count 3 must be reduced to a misdemeanor due to insufficient evidence supporting count 4. We agree.

Carrying a loaded firearm in public is usually a misdemeanor (§ 25850, subd. (a)) but is elevated to a felony when done while an active participant in a criminal street gang

under section 186.22, subdivision (a).⁴ (§ 25850, subd. (c)(3); *People v. Infante* (2014) 58 Cal.4th 688, 690-691 [interpreting former § 12031].) Having found that insufficient evidence supports count 4, the element of count 3 that elevates the offense to a felony is not satisfied. Count 3 must therefore be reduced to a misdemeanor.

B. Gang Enhancement

Defendant contends insufficient evidence supports the gang enhancements. We disagree.

In reviewing a challenge to the sufficiency of the evidence to support an enhancement, the standard of appellate review is the same as that applied to reviewing a challenge to the evidence supporting a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806; *People v. Mejia* (2012) 211 Cal.App.4th 586, 614.)

In connection with possession of a firearm (count 1), possession of ammunition by a prohibited person (count 2), and carrying a loaded firearm in public while an active participant in a criminal street gang (count 3), the jury sustained the gang enhancement allegation.⁵ To prove the gang enhancement, the prosecution was required to prove that Barrio Mojados Sureños was a criminal street gang, that the underlying felonies were committed for the benefit of, at the direction of, or in association with the gang, and that the offenses were committed with the specific intent to promote, further, or assist the gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 59; *People v. Gardeley* (1996) 14 Cal.4th

⁴ The sentencing court erroneously stated that defendant's conviction was elevated to a felony based on the section 186.22, subdivision (b)(1) enhancement.

⁵ Although the jury found the gang enhancement to count 3 true, the court only imposed the enhancement on counts 1 and 2. Because we have reduced count 3 to a misdemeanor, we note that the offence would no longer support the gang enhancement had it been imposed. (§ 186.22, subd. (b)(1) [subdivision (b)(1) applies to "a felony committed for the benefit of, at the discretion of, or in association with any criminal street gang . . ."].)

605, 609, 616-617, overruled on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

Defendant concedes that the evidence proved that Barrio Mojados Sureños is a criminal street gang and that defendant and Hernandez belonged to Barrio Mojados Sureños. Defendant challenges the sufficiency of the evidence to prove that he possessed a gun, ammunition, and carried the loaded gun to benefit his gang or that his offenses were committed with the specific intent to promote the criminal activities of his gang. Defendant argues mere speculation is insufficient and does not support the gang expert's inference that defendant's offenses were gang related. As the People respond, the facts underlying the offenses, the gang expert's testimony, and defendant's testimony support the jury's finding that counts 1, 2, and 3 were criminal gang activity.

Defendant had been an admitted Barrio Mojados Sureños gang member since 2011, committing crimes including burglary, fleeing from an officer with marijuana and a firearm in the car, and robbery. Defendant admitted his robbery offense increased his standing in his gang. Defendant testified that he joined the gang initially for easy access to guns, drugs, and protection. Just months prior to the current offenses, defendant had been released from prison and did not disassociate with his gang. Defendant claimed he feared retaliation from Sureños if he left the gang.

When defendant and Hernandez, both members of the Barrio Mojados Sureños gang, fled from Detective Ambriz, they were in their gang's territory. The neighboring territory was claimed by a rival gang. As defendant ran, he tossed the loaded firearm that he held in his waistband.

Defendant testified that he associated with Hernandez and that their activity could turn from neutral to gang related. If they encountered rival Norteños, violent confrontations could occur such as fighting, stabbing, and shooting. Defendant and Hernandez had been at a fast-food restaurant that was one or two blocks from where another one of defendant's cousins, also a Sureño gang member, had been killed.

Defendant testified that Norteños kill Sureños and that Norteños and Sureños are at war in Lodi. Defendant admitted he needed to protect himself based on his gang life. According to defendant, Barrio Mojados Sureños gang members possess weapons primarily for protection. Defendant fled from the officer because he tried to “avoid cops” in general.

The gang expert opined that defendant’s gang had ordered members to be armed and defendant followed orders. According to the expert, defendant benefited his gang by carrying the loaded firearm to protect their territory, to have it ready to use on or intimidate a rival gang member, or to threaten the public. The gang expert testified that one of the primary illegal activities of the Sureños was illegal weapon possession, that Barrio Mojados Sureños was one of three subsets of Sureños in Lodi, and that Barrio Mojados Sureños cooperated with other subsets of Sureños. Based on hypothetical questions, the gang expert opined that a person in defendant’s situation would be motivated to promote, further, or assist criminal conduct by his gang. The gang expert noted the gang-on-gang crime in the area where defendant was arrested, defendant’s gang’s orders to be armed, and the nonreporting of offenses to officers in Sureño territory.

Defendant’s reliance on cases with various fact patterns is of no assistance in reviewing the sufficiency of the evidence in this case. “Reviewing the sufficiency of evidence . . . necessarily calls for analysis of the unique facts and inferences present in each case, and therefore comparisons between cases are of little value.” (*People v. Rundle* (2008) 43 Cal.4th 76, 137-138, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Sufficient evidence supports a finding that defendant’s possession and carrying a loaded firearm benefited his gang. Sufficient evidence also supports the finding that defendant acted with the specific intent to promote his gang. Thus, the gang enhancements are supported by the evidence.

C. Prior Serious Felony Enhancement

Defendant contends that under recent changes to section 667 and section 1385, his case must be remanded so that the trial court can exercise newly granted discretion to decide whether to strike the prior serious felony enhancement imposed here.

As noted above, defendant's sentence included a five-year term for a prior serious felony enhancement under section 667, subdivision (a). At the time he was sentenced, the court had no discretion to strike the prior serious felony enhancement. (See former §§ 667, subd. (a), 1385, subd. (b).)

In September 2018, the Governor signed S.B. 1393, which amended section 667, subdivision (a) and section 1385, subdivision (b) to give the court discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) The statutory amendments became effective January 1, 2019. (Cal. Const., art. IV, § 8, subd. (c); Gov. Code, § 9600, subd. (a); *People v. Camba* (1996) 50 Cal.App.4th 857, 865.)

Defendant argues, and the People concede, that the amendments apply retroactively in this case because defendant's judgment was not final when S.B. 1393 went into effect. We agree. (See *People v. Jones* (2019) 32 Cal.App.5th 267, 272 [concluding S.B. 1393 applies retroactively to a judgment not final on the amendment's effective date].)

Because neither party argues that a remand would be futile (cf. *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 [remand under analogous Senate Bill No. 620 is required unless the record reveals a clear indication that the trial court would not have reduced the sentence, even if at the time of sentencing it had the discretion to do so]), defendant should have an opportunity to argue to the trial court that it should exercise its newly-granted discretion to strike the prior serious felony enhancement. We therefore remand for this purpose.

III. DISPOSITION

Defendant's conviction for count 4 is reversed, and his conviction for count 3 is reduced to a misdemeanor. The matter is remanded for resentencing including whether to exercise the court's discretion to strike the prior serious felony enhancement. Upon resentencing, the clerk is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

/S/

RENNER, J.

We concur:

/S/

BUTZ, Acting P. J.

/S/

HOCH, J.